2-03 Exam MPT - Sample Answer #1

Ruiz and Ruiz
Attorneys at Law
23765 Freeman Street
Carterville, Franklin 33314

February 25, 2003

John Erbes
O'Neill, Erbes & Crenshaw
1243 Douglas Dr.
Carterville, Franklin 33314

re: Murphy/Suarez Commercial Lease
2906 Sunset Blvd., Carterville, Franklin

Dear Mr. Erbes:

Please be advised that this office represents Carmen Suarez with respect to the above-referenced lease. I am in receipt of your demand letter dated February 24, 2003. I have spoken to my client about the demands contained therein and she has authorized me to refuse your offer. The same is therefore hereby refused.

I disagree with your conclusion that this lease is a "net lease," due to Ms. Murphy's obligations to pay the taxes on the premises, her obligation to maintain casualty insurance, and her continued ownership of the fixtures, operating systems and other improvements in the building. However, this distinction makes little difference to the refusal of your offer and your client's ultimate responsibility to pay for these repairs.

I think you will agree that the city's order to make these repairs were not related to my client's use of the building. No matter the use of this particular building, it is clear from the city's March 4, 2002 letter ordering compliance with the Earthquake Hazard Reduction Compliance Program (EHRCP), the order would have occurred regardless of the use of the building itself.

Since the order is non-use related, then the Brown factors must be considered to determine the allocation of the costs for these repairs. Brown v. Green, Frank. S. Ct. (1994). Those factors become "especially germane to so-called 'form' leases where the logic of the preprinted terms does not necessarily reflect the intent of the parties," as is the case here. Id. After a careful consideration of those factors, it is readily apparent that your client is wholly responsible for these repairs.

The first such factor relates to the "relationship of the cost of the curative action to the rent reserved in the lease." Id. This factor is particularly important, given this particular

circumstance:

> In cases where the term of the lease is relatively short and the cost of the repair in percentage terms is large in relation to the tenant's rent over the life of the lease, courts will almost universally refuse to give effect even to relatively clear language in imposing the repair duty on the tenant.

Id. (emphasis added). Here, the tenant's rent over the life of the lease, including the extension thereof, only amounts to $71,400.00. The repair costs of $32,000.00 represent nearly 50% of that total rent amount. Certainly, this high percentage alone will result in your client's duty to pay for the cost of these repairs.

The second factor is nearly as compelling to impose the burden of payment on your client. That factor considers the term of the lease juxtaposed with the tenant's expectation to perform costly repairs. In a short-term lease as here, the courts will not likely force the tenant to pay for these repairs. Id.

Similarly, the third factor addresses the recipient of these repairs. In a short term lease as this one, these extensive repairs will only benefit my client for approximately four more years, while your client will gain that benefit for the remaining life of the building - expected to be six to sixteen more years. The substantial benefit your client will receive from this repair outweighs any value to my client.

The fourth factor addresses the intent of the parties on who will perform structural repairs under the terms of the contract. Ordinarily, that burden falls on the landlord. Id. The terms of the contract specify that my client is responsible for structural repairs, however it only allocates that duty to repair resulting from tenant's use, prior use, or any other use of the premises. Lease, §12A. This structural repair did not result from use, but instead from regulation. Therefore, the lease agreement does not clearly shift our client's presumed burden in this instance and does not alleviate your client's responsibility to pay for these repairs.

Factor number five also favors my client. This factor asks whether the tenant's enjoyment of the premises would be interfered with while the work was performed. Brown v. Green. While it is true that your client assisted with minimizing this interference, your letter clearly indicates that my client could not have remained open during these repairs. Therefore, it seems that your client knew of the disruptive effect that these repairs would have over my client's business and accepted the responsibility of minimizing this interference. She should similarly recognize her responsibility of payment for the repairs themselves.

Finally, the sixth element that the court will consider is the likelihood that the parties contemplated the EHRCP. The city began debating this program in 1995, four years before my client originally entered into this lease. As a builder owner, your client should have been making plans for these repairs for a long time. As reported in the Carterville Times on September 30,

2002, “any property owner who hasn’t been making plans for this for the past five years has had his head in the sand.” My client could not have been aware of this development and should not now be forced to compensate your client for her lack of planning.

I hope you will consider the above arguments and discuss the same with your client. As you can see, my client has ample reason to support her refusal to pay for these repairs. Consequently, we believe that, should your client instruct you to file suit, the litigation will be protracted, expensive and unsuccessful. At this time, our client has instructed me to allow you to withdraw this claim, which would ultimately save your client unnecessary litigation expense on top of her burden to pay for these repairs. Please inform the undersigned in writing of your client’s decision after consultation. I look forward to your response.

Very truly yours,

2-03 Exam MPT - Sample Answer #2

Ruiz and Ruiz
February 25, 2003

John Erdes, Esq.
O'Neil, Erdes & Crenshaw
1243 Douglas Drive
Carterville, Franklin 33314

Re: Responsibility for the costs of structural repairs at
2906 Sunset Boulevard, Carterville, Franklin

Dear Mr. Erbes,

Our firm has been retained to represent Carmen Suarez in the dispute between Ms. Suarez and her landlord, Elizabeth Murphy, regarding the seismic repairs made to the property at 2906 Sunset Boulevard, Carterville, Franklin, by the order of the city. We have reviewed your letter to Ms. Suarez dated February 24, 2003, and we do not believe your client would prevail if she initiates legal action.

As you are aware, your client was ordered to make repairs to the referenced property by the City of Carterville. The issue of who is responsible for those repairs will be determined by the appropriate ordinances, regulations, statutes and case law. Our research has not revealed any local ordinances, regulations or statutes on point. Consequently, we believe this issue will be determined by relevant case law.

The seminal case appears to be Sewell v. Loverde, FSC (1969). At issue in that case was who should be responsible for the costs associated with the connection of a sewer line from a trailer to the public sewer system. The Sewell case held that absent an express assumption by the tenant, the landlord is initially under a duty to comply with all laws and orders governing the use of the land unless the tenant's use of the land leads to the government's compliance order. In this case, Ms. Suarez's use of the leased property did not lead to the government order so she may only be liable for the costs if she expressly assumed that liability. We are of the opinion that she did not expressly assume the liability.

Our opinion that she did not is based on the more recent case on point, Brown v. Green, FSC (1994). At issue in that case was who, between landlord and tenant, was responsible for asbestos abatement. The Brown court instructed that the first issue is to determine the intent of the parties regarding non-use related obligations. The court first looked to the "four corners" of the lease document. There, as here, it was a standard industrial net lease. The Brown court noted that Sewell was not dispositive because the tenant's use did not trigger the asbestos abatement order. The Brown lease appeared to transfer from the landlord to the tenant all the major burdens of ownership. Notwithstanding that position, the Brown court held that the "net" lease was not

dispositive of whether, in the absence of explicit language, the parties intended that the tenant was responsible for non-use related legal compliance.

First, we are not sure that the lease in question here is a "net" lease. The Brown court, in footnote one of the opinion, stated that language of the standard lease that had been stricken or added was instructive regarding intent. In this case, Section 9 of the lease was amended so that Ms. Murphy remained responsible for property taxes. In that same section, language was crossed out making Ms. Suarez responsible for assessments effecting improvements levied by the government. In Section 10, all of the landlord's warranty regarding whether the property violated applicable codes, etc, was crossed out. Finally, in Section 18, the language was amended removing from Ms. Suarez the duty to maintain casualty insurance. All of the deleted or changed language points to the conclusion that this was not a "net" lease with Ms. Suarez assuming all responsibilities.

Assuming, arguendo, that the lease is construed as a "net" lease, the Brown court set forth a six-part test. The first of the six parts relates to the relationship of the cost of the curative action to the rent reserved in the lease. Here the curative action cost $32,000. The full eight year lease obligation for Ms. Suarez is $71,400. The cost is almost half the rent. A percentage of this degree would be a significant factor that Ms. Murphy has the risk of repair.

The second prong is the term of the lease. This lease was initially for three years and then extended for five more years for a total of eight. The lease ends on June 30, 2007. Therefore, the lease is almost half over. With such a short term lease, it is unlikely that Ms. Suarez assumed the obligations of making such extensive, costly repairs.

The third issue is the benefit Ms. Suarez will receive as compared to the benefit Ms. Murphy will receive. Here, Ms. Suarez will only receive the benefit for approximately four more years, with June 30, 2007. Ms. Murphy on the other hand will have a structurally upgraded building she can continue to lease and probably at a much higher rent.

The fourth part of the test is whether the curative action was structural or nonstructural in nature. Here it was clearly structural. The repairs included a new steel frame for the core of the building and foundation anchors. Ordinarily structural repairs fall to the landlord.

The fifth part of the test is the degree to which Ms. Suarez's enjoyment of the property was affected by the repairs. Here we acknowledge that Ms. Suarez was able to continue operations, although with difficulty, while the repairs were ongoing.

Finally, the Brown court looked to the parties contemplation that the repairs would be required. As you aware, the compliance program was passed in September 2000. However, there had been on-going debate over the topic for almost five years before. The debate began long before our client became a tenant. Ms. Murphy, as an experienced landlord and business person, certainly should have contemplated these repairs. Whether or not Ms. Suarez would contemplate such repairs and assume them is problematic at best.

When reviewing the six part Brown test, we are confident that the parties did not intend that Ms. Suarez would assume responsibility for the structural retrofit for earthquake protection. We also feel confident that a court would reach the same conclusion. Therefore, we have recommended to Ms. Suarez that she not pay Ms. Murphy for the costs associated with bringing Ms. Murphy's building into compliance.

We each owe a duty to our clients to protect them from protracted and expensive litigation. We believe that it would be in the best interests of both of our clients not to pursue legal action on this issue.

Please contact me if you have any questions about our position or would like to discuss the matter further. However, we are unlikely to change our position based on the facts and law as we understand them today.

Very Truly Yours,

James D. Caver

2-03 Exam MPT - Sample Answer #3

To: John Erbes
Attorney at Law
O'Niel, Erbes, & Cranshaw
1243 Douglas Drive
Carterville, Franklin 33314

Dear Mr. Erbes:

You recently contacted our client, Carmen Suarez, regarding indemnification for your client, Elizabeth Murphy's repairs on Ms. Suarez's leased building. You informed Ms. Suarez that you requested she pay your client $32,000 and that, if this payment were not made, you would seek legal recourse. This letter is to inform you that Ms. Suarez I) will not pay the requested $32,000 sum, and II) in our professional opinion we feel strongly that Ms. Suarez is under no legal duty to pay this sum and , as such, a lawsuit demanding this payment would be unsuccessful.

First of all, with regard to point I : Ms. Suarez will not pay the requested $32,000. You indicated in your letter that pursuant to Section 12 and 42 of what you alleged was a "net" lease, the tenant would be responsible for city mandated repairs.

With regard to the "net" lease allegation. The case of Brown v. Green, set forth in the Supreme Court of this circuit, the state of Franklin, explicitly sets form that a standard lease agreement labeled as "net" (as is the case at issue between us) does not conclusively make it a net lease. Rather, the Supreme Court illustrates that a net lease is one in which specific requirements are present, including a) tenant responsibility for taxes (not present in our case pursuant to Section 9); b) tenant responsibility for insurance (not present in our case pursuant to Section 18.)

The Supreme Court set forth that a "net" lease is one in which the landlord turns over to the tenant essentially full ownership rights. This was not the case between Ms. Suarez and your client. As this court illustrated, it must be "clear from the four corners of the agreement that the parties intended to transfer from landlord to tenant the major burdens of ownership over the life of the lease." Certainly, the absence of both taxes and insurance do not indicate intent to transfer full ownership.

In Sewell v. Loverde, the Franklin Supreme Court stated that the "property owner is initially under a duty to comply with all laws and orders governing use of the land, as landlord, and remains subject to that duty unless the tenant expressly assumes it. In Sewell, the tenant was deemed to have assumed responsibility for the expense because of the likelihood of the expense occurring during his leasehold. This is clearly distinguished in our case. Clearly, Ms. Suarez did not anticipate, nor should she reasonably have, that she would be faced with an expense to retrofit her leased property to meet seismic demands. As a result, she is under no duty to pay for the cost alleged by you in your letter to Ms. Suarez.

Regarding issue II, a review of the applicable law set forth by the binding Supreme Court of this

jurisdiction illustrates that a lawsuit on this issue will not be successful. The court in Brown set forth a 6 part test when determining the allocation of repair and maintenance obligations in a commercial lease. (The court also stated that these factors are "especially germane to so-called "form" leases where the logic of the preprinted form does not necessarily reflect the intent of the parties)

Prong 1: "The relationship of the cost of the curative action to the rent in the lease." The court stated specifically that in cases where the term of the lease is relatively short and the cost of the repair is high, courts will "almost universally" refuse to give effect even to relatively clear language imposing a duty on the tenant. In this case, Ms. Suarez has only been in the building 3 years. The cost of that lease was $23,400. Even if the court considers the 5 yr. lease extension, the grand total of her leasehold would only be $61,400. The cost of the retro fit was over half of her total 8 yr lease. The courts would likely find this amount to great to impose a duty on the tenant.

Prong 2: "The term of the lease" The useful life, if the article in the Carterville Times is correct, is estimated at between 10 - 20 years. Ms. Suarez has been in this building only 3 years, and only has extended her rights for another 5. The court in Brown stated that "with a short term lease, it is highly unlikely the tenant would be expected to take on ownership obligations.

Prong 3: "The amount of benefit the tenant will derive" - Ms. Suarez will not benefit from the repairs. They don't add to the ambiance of her restaurant, rather they result in a large iron support beam in the middle of her space. This gives her no benefit.

Prong 4: Whether the repair is structural or non structural. The Brown court held that absent lease language that shifts the burden, the burden of making structural repairs falls on the landlord. While the lease at issue states that tenant is responsible for "structural repairs" this is not a repair. This is a re-fabrication of work that should have been done upon the original construction.

Prong 5: Inapplicable.

Prong 6: "The likelihood the parties contemplated the order." Specifically, the Brown court held that "where a condition is unforeseeable, we would be loath to apply this factor against an unsuspecting tenant, but where it is foreseeable to an experienced tenant, will apply." Ms. Suarez, as discussed above, can not reasonably be expected to foresee this expense. As such, the courts will not hold her responsible for payment.

*It is important to note that these 6 factors are especially important, because they will be applied by the court even when a "net" lease is not found.

In closing, Mr. Erbes, I am sure that a review of this law and the facts of this disagreement will lead you to the same conclusion. Ms. Suarez is not responsible for this expense, not under the contract nor under applicable case law. The Supreme Court of Franklin is clear on this issue.

Ms. Suarez and Ms. Murphy have, up until this disagreement, maintained a cordial and mutually beneficial relationship. It is in the interests of both parties to handle this issue effectively and efficiently. As such, we respectfully request that this entire matter be dropped and that you and your client cease in requesting payment of $32,000 from our client. This will be the best result for both our clients.

Thank you for your attention, please feel free to contact me if you have any questions or concerns.

Sincerely,

Counsel for Carmen Suarez